In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1522

RAYMOND MARQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erroneously denied his belated motion for a new trial predicated on the perjury of government witnesses.

After a jury trial in the United States District Court for the Southern District of New York, petitioner and two co-defendants were convicted on all three counts of an indictment charging interstate travel to distribute gambling proceeds, interstate travel in furtherance of an extortion, and conspiracy, in violation of 18 U.S.C. 1952 and 371. Petitioner was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed, 449 F. 2d 89, and this Court denied certiorari, 405 U.S. 963.

Nearly two years later, petitioner filed a motion for a new trial predicated upon the alleged perjury of witnesses Monserrate and Alvarez at his trial.

Evidence at the 1970 trial established that petitioner, who ran an illegal gambling operation in which Monserrate was employed as a messenger, accused Monserrate of cheating the operation and, by means of threats against him and his father-in-law, Alvarez, caused Monserrate to travel to Puerto Rico for the purpose of returning to petitioner funds of which the operation was allegedly cheated.

Monserrate had testified at the trial that in December 1969 co-defendant Rivera brought him and Alvarez to petitioner's establishment, where petitioner accused him of placing bets after the "numbers" had been published (T. Tr. 32-42).[1] Monserrate testified that, as a result of threats of physical violence made by petitioner and co-defendant Angelet, he withdrew $1,000 from a bank and gave either $700 or $800 to Rivera, who delivered the money to petitioner. Monserrate purchased round trip air transportation to Puerto Rico with the balance. In Puerto Rico, Monserrate obtained $7,435 from a relative, returned to New York, and was met at Kennedy Airport by FBI agents, who induced him to cooperate with the government. The Agents took the money and gave Monserrate a receipt for it (T. Tr. 57-65). On the agents' instructions, Monserrate delivered the $7,435 to petitioner the next day while under surveillance by the FBI agents, who then arrested petitioner (T. Tr. 64-75).

At trial Monserrate testified for the government as to the extortion scheme but denied having cheated petitioner's gambling operation (T. Tr. 71, 177, 233, 234, 242). Alvarez testified that, as a result of threats made

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[1] "T. Tr." denotes the transcript of petitioner's original trial in 1970. "H. Tr." denotes the transcript of the hearing on petitioner's motion for a new trial.

by petitioner and his co-defendants, he paid $1,000 to petitioner (T. Tr. 416-422). Alvarez likewise denied cheating the operation (T. Tr. 421, 444-445, 465, 468-469). Testimony of the FBI agents and documentary evidence, including airline ticket stubs, bank books, and photocopies of the currency paid by Monserrate to petitioner, corroborated the government's presentation of events (T. Tr. 62, 275-278, 288-292, 320-325, 329-333, Govt. Exhs. 1, 2, 6-9).

During 1972 Pedro Lopez, an acquaintance of Monserrate, was engaged by petitioner to enter into discussions with Monserrate while concealing a tape recorder on his person (H. Tr. 5-6, 10-15). Statements made by Monserrate and Alvarez while intoxicated, and recorded secretly by Lopez, allegedly contradicted their earlier sworn testimony (Def. Exhs. A-G). At an evidentiary hearing on the new trial motion, Monserrate admitted that he had in fact cheated the gambling operation, but insisted that this was the only matter as to which he had testified falsely at petitioner's trial; he otherwise adhered to the substance of his original testimony.

In a written opinion (Pet. App. A) affirmed by the court of appeals (Pet. App. B), the district court found that Monserrate had told the truth at trial when he testified that he gave the money to the FBI agents at the airport and that petitioner ordered him to go to Puerto Rico to obtain the money. In denying petitioner's motion for a new trial, the court held that although Monserrate and Alvarez testified falsely that they had not cheated petitioner's operation, the testimony neither resulted from governmental misconduct nor was relevant to the principal issues at trial. The court found that,

had Monserrate and Alvarez admitted their cheating at trial, it would not have raised a reasonable doubt in the mind of a single juror.

The court's finding that there was no government misconduct with respect to the witnesses' perjury was supported by the record. In their investigation, the FBI agents repeatedly asked Monserrate whether he had cheated petitioner's operation; Monserrate insisted that he had not, that he simply bet constantly. The government possessed no evidence to the contrary. Even when confronted with Lopez's recordings, Monserrate at first continued to insist that he had testified truthfully.

Absent governmental misconduct, a new trial should be ordered only if new evidence is discovered that would probably produce a different verdict. *United States* v. *DeSapio,* 435 F. 2d 272, 286, n. 14 (C.A. 2), certiorari denied, 402 U.S. 999; *United States* v. *Kahn,*[2] 472 F. 2d 272, 287 (C.A. 2), certiorari denied, 411 U.S. 982.[2] In the circumstances of the instant case, we submit that the trial court correctly held that the newly discovered evidence would not have raised a reasonable doubt in the mind of a single juror.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[2]The more stringent test of *Larison* v. *United States,* 24 F. 2d 82, 87 (C.A. 7), has no application where, as here, the perjury is committed without governmental misconduct. See *United States* v. *DeSapio, supra.*